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# DEVOLUTION AND THE PARADOX OF DEMOCRATIC UNRESPONSIVENESS

JAMES A. GARDNER\*

Although the participants in the South Texas College of Law's Symposium on Comparative Federalism in the Devolution Era addressed a wide range of topics, one message came through loud and clear: around the globe, many people are demanding, with some frequency and with considerable success, that more and more governmental power be exercised by smaller and smaller units of government. In some cases (Czechoslovakia, Quebec), this demand has taken the form of a demand for outright political independence. In other cases (Tatarstan, KwaZulu/Natal), the demand has been one for a greater degree of subnational power within a larger, more or less federal system—a demand, that is to say, for devolution. The panelists' accounts of these demands also brought home another important point: for the most part, contemporary demands for devolution have been justified by reference to some kind of right to local or ethnic self-determination. Thus, even when demands for self-determination fall short of demands for complete separation—when they are demands for devolution rather than independence—they typically draw upon the same stock of Romantic concepts of group identity, and its reification in the political world, that have in this century provided so much of the ideological infrastructure for nationalist and separatist movements.<sup>1</sup> Power must be exercised by subnational governments, in this account, because those governments are the vehicles by which organic, subnational groups may fulfill their

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1. See LIAH GREENFELD, *NATIONALISM: FIVE ROADS TO MODERNITY* 8–11 (1992). The influence of Romantic ideas of nationalism is made apparent in works such as WALKER CONNOR, *ETHNONATIONALISM: THE QUEST FOR UNDERSTANDING* (1994); SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER* (1996); MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (1993); WILLIAM PFAFF, *THE WRATH OF NATIONS: CIVILIZATION AND THE FURIES OF NATIONALISM* (1993); and ANTHONY D. SMITH, *NATIONAL IDENTITY* (1991).

historical destiny to act collectively on the world stage.<sup>2</sup>

This tendency to justify devolution in nationalist terms stands in considerable contrast to the justifications for devolution typically advanced in the United States. Here, too, many have called for the transfer to the state level of powers now exercised by the national government. Yet devolution's proponents in this country typically defend it in very different terms, terms that are functional rather than ideological. Most commonly, devolution in this country is defended on the instrumental ground that it makes government more responsive to the popular will, thereby enhancing popular control over government and strengthening democracy. This claim in turn depends upon the belief, commonplace in American constitutional jurisprudence, that state governments are more democratically responsive than the national government.<sup>3</sup> In the American account, then, a power that may constitutionally be exercised at either the state or national levels is usually better exercised by state governments because they are simply more likely than the federal government to do what the people want.

This paper, attempts to balance the account of devolution presented at the Symposium by exploring the functional, democratic justification for devolution that dominates the issue in American politics. One of the most striking features of the constitutions of the American states is the extent to which they include far more numerous mechanisms of direct popular control than does the United States Constitution. The question I shall address is whether state

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2. See GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* 38–47 (J. Sibree trans., Dover 1956).

3. The claim that state governments are more democratically responsive than the national government is sometimes meant in two distinct ways. First, the exercise of power on the state level is sometimes said to be more responsive because it better accommodates heterogeneity. Policy preferences often differ from region to region and state to state. While summing individual policy preferences nationwide should produce a policy that is preferred by a national majority, summing and implementing policy preferences state by state may be even more responsive by allowing an even greater number of people to be governed by policies that they prefer, thereby increasing overall social utility. See *generally* *FEDERALISM AND RIGHTS* (Ellis Katz & G. Alan Tarr eds., 1996); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987).

Second, a state government is sometimes said to be more responsive than the national government because state governments are simply more likely to do what the people want. On this view, state governments are, for some set of institutional reasons, more democratic—more responsive to the will of the relevant polity—than is the national government. These two claims are of course related: the exercise of power on the state level is unlikely to better accommodate heterogeneous policy preferences across state polities unless state governments are at least as responsive to state polities as the federal government is to the national polity.

constitutions, by virtue of their employment of far stronger and more numerous mechanisms of popular control, have succeeded in making state government more democratically responsive than the United States Constitution makes the national government. This inquiry in turn may provide some basis for judging whether the policies of devolution urged in the United States can be adequately justified in the terms in which they are typically defended.

Part I of this paper examines the federal Constitution in light of the assumptions concerning governmental responsiveness that guided its drafters, and then presents an overview of the contrasting mechanisms of democratic responsiveness found in state constitutions. Part II examines the differences between the federal and state constitutional approaches to democratic responsiveness to determine whether they can be explained by differing philosophical assumptions about governance. I conclude that the differences cannot be so explained. Part III turns to the question of whether state constitutions have succeeded in making state governments more democratically responsive than the federal government. Drawing on some recent work by political scientists, Part III suggests that state constitutional mechanisms of democratic control do not make state governments more responsive to the popular will than the federal government, but that they probably make state governments responsive to different kinds of influences. Part III also presents the paradox of democratic unresponsiveness: the more seriously democratic governments take their obligation to respond to the majority will, the less responsive they become. Finally, Part IV briefly explores some possible resolutions of the paradox of democratic unresponsiveness.

## I. CONSTITUTIONAL MECHANISMS OF POPULAR CONTROL

A fundamental prerequisite to the legitimacy of democratic regimes is responsiveness to the popular will. Democracy, like other forms of popular sovereignty, is a species of *self-rule*; and self-rule, unlike submission to the rule of others, presupposes governance in accordance with the wishes of the governed. Maintaining governmental responsiveness has accordingly been a preoccupation of contemporary democratic regimes, and never more so than in the contemporary United States; political philosopher Michael Sandel calls the fear of loss of self-government one of the defining anxieties of our age.<sup>4</sup>

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4. MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 3 (1996).

Among the legacies that the American founding generation bequeathed to its successors is the conviction that the goals for which government is established can best be achieved through careful institutional design. The Framers of the United States Constitution believed themselves engaged in the experiment of determining "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."<sup>5</sup> The United States Constitution was the product of this political experiment in reflection and choice. Consequently, in this country the question of how best to assure governmental responsiveness is often cast as a question of constitutional structure.

Since the first American Constitutions were drafted in 1776, constitutional architects have devised a great variety of institutional mechanisms to keep American governments responsive to the wishes of their constituents. The two most prominent, of course, are the election of legislative representatives, a feature of every American constitution, and mechanisms of direct democracy such as initiatives and referenda, found in some state constitutions. Yet to these must be added many other devices such as term limits, rotation in office, recall of sitting officials, the election of judicial and lower executive branch officials, and many others.

The great majority of these institutional mechanisms for the preservation and enhancement of governmental responsiveness appear exclusively in the constitutions of the states, a hardly surprising result. State constitutions are generally easier to amend than the federal Constitution,<sup>6</sup> and the lesser veneration in which they are held has sometimes made state polities more willing to experiment in the field of constitutional design. Moreover, states have been admitted to the Union throughout our history, meaning that their constitutions have been drafted under the influence of political and philosophical assumptions that may have differed from those of the eighteenth-century drafters of the first generation of American constitutions. For example, many state constitutions were either drafted or significantly amended under the powerful influence of the good government assumptions of early twentieth-century Progressivism. The constitutionalization of initiatives and referenda, for example, can be

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5. THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

6. An influential early critique of the ease of state constitutional amendment is Note, *California's Constitutional Amendomania*, 1 STAN. L. REV. 279 (1949).

traced largely to this period.<sup>7</sup>

The purpose of these state constitutional changes was obviously to make state government more democratically responsive. Has this occurred? A useful way to begin answering this question is to take a closer look at the various means constitutional architects have devised to maintain the democratic responsiveness of government institutions.

#### A. *The Unresponsive National Constitution*

The United States is usually referred to colloquially as a democracy. In fact, the federal Constitution creates a republican form of government with surprisingly few democratic features. As Madison candidly explained, the federal Constitution is characterized by a "total exclusion of the people in their collective capacity" from the reins of government.<sup>8</sup> Instead, the most democratic feature of the original Constitution was the establishment of popular elections for Representatives.<sup>9</sup> Until ratification of the Seventeenth Amendment, Senators were elected by state legislatures rather than popularly.<sup>10</sup> The Constitution mandates no popular role in presidential elections: not only is the President elected by the Electoral College, but the Constitution leaves the manner of selecting electors to the state legislatures.<sup>11</sup> The contemporary practice of popular election to the Electoral College is thus a matter of legislative grace rather than constitutional entitlement.

Federal judges at all levels are, of course, appointed by the President,<sup>12</sup> as are all executive branch officials. There is no provision in the federal Constitution for any mechanism of direct democracy such as the initiative or referendum, nor even for any kind of nonbinding plebiscite. Indeed, the Supreme Court has held that the United States Constitution does not establish any substantive constitutional right to vote—not even for offices required by the Constitution to be filled by popular election: "The Constitution," as the Court has often said, "does not confer the right of suffrage upon any one."<sup>13</sup> Similarly, the Constitution in the Court's view does not

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7. See *infra* notes 60–65 and accompanying text.

8. THE FEDERALIST NO. 63, at 387 (James Madison) (Clinton Rossiter ed., 1961).

9. U.S. CONST. art. I, § 1.

10. *Id.*, art. I, § 2.

11. *Id.*, art. II, § 1, cl. 2.

12. See *id.*, art. II, § 2, cl. 2.

13. *Minor v. Happersett*, 88 U.S. 162, 178 (1874); accord *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973).

establish any right to run for or hold public office.<sup>14</sup> Finally, although the Constitution seems explicitly to forbid the establishment within a state of an overtly monarchical or aristocratic form of government,<sup>15</sup> the Court has for a century and a half held the much more pertinent constitutional guarantee of republican government<sup>16</sup> to be judicially unenforceable under the political question doctrine.<sup>17</sup>

These features of the United States Constitution result from a deliberate choice by the Framers to create a document that was undemocratic. Like the ancient Greeks, the Framers feared democracy, associating it with instability and the rule of the mob. "Democracies," wrote Madison, "have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."<sup>18</sup> The critical flaw in democracy, the framers believed, lay in its susceptibility to faction, and particularly to majority faction, which Madison identified as the single most important problem against which constitutional designers must guard.<sup>19</sup> In consequence, the framers deliberately structured the federal Constitution to impede the coalescence of majority factions, and, in the event such factions managed to appear, to contain their effects. The Constitution accordingly establishes a large republic, divides power among the branches of government, and divides it further among state and national governments in a federal system.

The idea that *majority* faction could be a serious problem for a self-governing populace is an incongruous one in a society dedicated to the principle of popular sovereignty. Madison defined a faction as

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14. See *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (applying rational basis scrutiny to restrictions on candidates' ability to run for office); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (holding barriers to a candidate's access to the ballot do not require strict scrutiny).

15. See U.S. CONST. art. I, § 9, cl. 8, & § 10, cl. 1.

16. The Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." *Id.*, art. IV, § 4.

17. See generally *Baker v. Carr*, 369 U.S. 186 (1962); *Colegrove v. Green*, 328 U.S. 549 (1946); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Luther v. Borden*, 48 U.S. 34 (1849). But see *New York v. United States*, 505 U.S. 144, 183-85 (1992); *Minor v. Happersett*, 88 U.S. 162, 175-76 (1874). The Court's position has been forcefully criticized. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* 260 n.118 (1980) (criticizing Court's generalization of holding in *Luther* to all invocations of claims under the clause as "rooted in a category mistake" and "a gross mistake of logic"); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

18. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

19. *Id.* at 80.

“a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>20</sup> But if a faction is a group opposed to the permanent and aggregate interests of the community—opposed that is, to pursuit of the common good—how can it be said that a *majority* of citizens could ever amount to a faction? Surely it must be more correct to say that the wishes or interests of the majority *define* the common good.

The main reason why the notion of a majority faction did not strike the Framers as contradictory is that they believed in an objectively defined common good, one that simply did not vary with the changing understandings of a majority of the citizenry. This should not surprise us. The founding generation, after all, grew up under the influence of a rationalist epistemology according to which moral truths, including the nature of the common good, were fixed, objective, and capable of discovery through the use of proper reasoning.<sup>21</sup> Nowhere has this philosophy been more succinctly capsulized than in the assertion that “We hold these truths to be self-evident.”<sup>22</sup>

In light of these views, it is clear why the framers of the federal Constitution had little interest in creating a democratically responsive document. The kind of responsiveness in which they were primarily interested was responsiveness to the objectively knowable common good rather than responsiveness to the will of the populace. Indeed, democratic responsiveness was more likely to constitute a problem to be overcome than a solution to be welcomed. As a result, the Constitution is filled with provisions that *impede* its responsiveness—for example, bicameralism, the presidential veto, judicial review, six-year senatorial terms, life tenure for judges, and so on.<sup>23</sup> The federal Constitution thus creates a government that is, if not democratically unresponsive, at least incompletely responsive to the popular will.

#### *B. State Constitutional Pursuit of Democratic Responsiveness*

Even the briefest glance at the constitutions of the various

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20. *Id.* at 78.

21. See, e.g., MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 20–21, 217 (1987).

22. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also WHITE, *supra* note 21, at 9–60.

23. U.S. CONST. art. I, §§ 2, 3; art. I, § 7, cl. 2; art. III, § 2; art. I, § 3, cl. 1; art. III, § 1.



American states suggests numerous reasons to think that state governments might be far more responsive to the popular will than the federal government: state constitutions contain far more mechanisms of democratic control than the federal Constitution. Undoubtedly the most widely known of these institutions are the initiative and referendum, state constitutional provisions that establish a form of direct democracy by authorizing the people to bypass the legislature and, through direct collective action, amend the state constitution or enact legislation. Yet initiatives and referenda represent only the tip of the iceberg—in fact, state constitutions are filled with a wide variety of mechanisms designed to increase the democratic accountability of state governments.

First, unlike the United States Constitution, the constitution of every state contains an affirmative grant of the franchise.<sup>24</sup> These franchise provisions, moreover, are generally held by state courts to give rise to a judicially enforceable substantive right to vote in state and federal elections.<sup>25</sup> In many states, the right to vote is supplemented by its logical corollary, a constitutionally guaranteed right to run for office.<sup>26</sup> State constitutions also provide many more opportunities to exercise this right to vote: all but four provide for independent popular election of lower executive branch officials such as the state's attorney general or chief financial officer,<sup>27</sup> and many provide for popular election to numerous executive offices, up to as many as ten.<sup>28</sup> In addition, the constitutions of 42 states provide for popular election of at least some state judges.<sup>29</sup> Popular control of

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24. See, e.g., COLO. CONST. art. VII, § 1; GA. CONST. art. II, § 1, ¶ II; HAW. CONST. art. II, § 1; KAN. CONST. art. V, § 1; MINN. CONST. art. VII, § 1; N.C. CONST. art. VI, § 1; OR. CONST. art. II, § 2; UTAH CONST. art. IV, § 2.

25. See, e.g., *Opinion of the Justices*, 330 A.2d 774, 775 (N.H. 1974) (holding that infringements of state constitutional right to vote are subject to strict scrutiny); *Smith v. Penta*, 405 A.2d 350, 353 (N.J. 1979) (same). Some states recognize a substantive right to vote guaranteed by the state constitution, but accord it protection only at the rational basis level. See, e.g., *Allen v. Merrell*, 305 P.2d 490, 491 (Utah 1956), *vacated on other grounds*, 353 U.S. 932 (1957).

26. See, e.g., *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 594 (Mass. 1983); *Elbers v. Grove*, 502 N.W.2d 810, 813 (Minn. 1993); *State ex rel. Sowards v. County Comm'n*, 474 S.E.2d 919, 925 (W. Va. 1996).

27. See COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES* 33–34 (1996–1997). The exceptions are Maine, New Hampshire, New Jersey and Tennessee.

28. For example, in North Carolina and North Dakota the Governor, Lieutenant Governor, Secretary of State, Attorney General, Treasurer, Auditor, and Commissioners of Education, Agriculture, Labor and Insurance are all elected. *Id.*

29. See, e.g., ALA. CONST. art. VI, § 152; ALASKA CONST. art. IV, § 6; ARIZ. CONST. art. VI, § 12; ARK. CONST. art. VII, §§ 6, 17; CAL. CONST. art. VI, § 16; COLO. CONST. art. VI, § 25; CONN. CONST. art. V, § 2; FLA. CONST. art. V, § 10; GA. CONST. art. VI, § 7;

state officials, however, is not confined to electing them but often extends to getting rid of them as well. For example, the constitutions of twelve states provide for popular recall of sitting officials.<sup>30</sup> At least eighteen states constitutionally impose term limits on at least some elected officials, principally legislators.<sup>31</sup> Twenty-six states establish mandatory rotation in office by disqualifying their governors from succeeding themselves.<sup>32</sup>

The constitutions of many states also enhance the responsiveness of state government through a variety of regulatory measures. Twenty-eight state constitutions explicitly require that elections be "free," "equal," "fair" or "open,"<sup>33</sup> a potentially powerful but

IDAHO CONST. art. V, § 6; ILL. CONST. art. VI, § 12; IND. CONST. art. VII, § 11; IOWA CONST. art. V, § 17; KAN. CONST. art. III, § 5; KY. CONST. § 117; LA. CONST. art. V, § 22; ME. CONST. art. VI, § 6; MD. CONST. art. IV, § 3; MICH. CONST. art. VI §§ 2, 8, 12; MINN. CONST. art. VI, § 7; MISS. CONST. art. VI, § 145; MO. CONST. art. V, § 17; MONT. CONST. art. VII, § 8; NEB. CONST. art. V, § 21 (3); NEV. CONST. art. VI, § 3; N.M. CONST. art. VI, § 4; N.Y. CONST. art. VI, § 610; N.C. CONST. art. IV, § 9; N.D. CONST. art. VI, § 7; OHIO CONST. art. IV, § 6; OKLA. CONST. art. VII, § 3; OR. CONST. art. VII, § 1; S.D. CONST. art. V, § 7; TENN. CONST. art. VI, § 3; TEX. CONST. art. V, § 2; UTAH CONST. art. VIII, § 9; VT. CONST. ch. II, § 50; WASH. CONST. art. IV, § 3; W. VA. CONST. art. VIII, §§ 2, 5; WIS. CONST. art. VII, § 4; WYO. CONST. art. V, § 4(g).

30. See, e.g., ALASKA CONST. art. XI, § 8; ARIZ. CONST. art. VIII, § 1; CAL. CONST. art. II, §§ 13-19; COLO. CONST. art. XXI, § 1; IDAHO CONST. art. VI, § 6; KAN. CONST. art. IV, § 3; MICH. CONST. art. II, § 8; NEV. CONST. art. II, § 9; N.D. CONST. art. III, § 10; OR. CONST. art. II, § 18; R.I. CONST. art. IV, § 1; WASH. CONST. art. I, § 33.

31. See, e.g., ARK. CONST. amend. 73; CAL. CONST. art. IV, § 2 (Legislative), art. V, § 2 (Executive); COLO. CONST. art. V, § 3 (Legislative); DEL. CONST. art. III, § 5; FLA. CONST. art. VI, § 4; HAW. CONST. art. V, § 1; LA. CONST. art. III, § 4 (Legislative), art. IV, § 3 (Executive); MICH. CONST. art. IV, § 54 (Legislative), art. V, § 30 (Executive); MISS. CONST. art. V, § 116 (Executive); MO. CONST. art. III, § 8 (Legislative), art. IV, § 17 (Executive); MONT. CONST. art. IV, § 8 (Legislative, Executive); NEB. CONST. art. III, § 8 (Legislative), art. XV, §§ 19, 20; NEV. CONST. art. IV, § 3 (Legislative), art. V, § 3 (Executive); N.D. CONST. art. V, § 12 (Treasurer); OHIO CONST. art. II, § 2 (Legislative), art. V, § 8 (Executive); OKLA. CONST. art. V, § 17(a); OR. CONST. art. II, § 19; S.D. CONST. art. III, § 6 (Legislative).

32. See, e.g., ALA. CONST. amend. 282; ALASKA CONST. art. III, § 5; ARIZ. CONST. art. V, § 1; COLO. CONST. art. IV, § 1, cl. 2; GA. CONST. art. V, § 1; HAW. CONST. art. V, § 1; IND. CONST. art. V, § 1; KAN. CONST. art. I, § 1; KY. CONST. § 71; M.R.S.A. CONST. art. V, Pt. 1, § 2; MD. CONST. art. II, § 1; MONT. CONST. art. IV, § 8; NEB. CONST. art. III, § 8; N.J. CONST. art. V, § 5; N.M. CONST. art. V, § 1; N.C. CONST. art. III, § 2; OHIO CONST. art. III, § 2; OKLA. CONST. art. VI, § 4; OR. CONST. art. V, § 1; PA. CONST. art. IV, § 3; R.I. CONST. art. IV, § 1; S.C. CONST. art. IV, § 3; S.D. CONST. art. IV, § 2; TENN. CONST. art. III, § 4; VA. CONST. art. V, § 1; W. VA. CONST. art. VII, § 4.

33. See, e.g., ARIZ. CONST. art. II, § 21 ("Elections shall be free and equal"); ARK. CONST. art. III, § 2 ("free and equal"); CAL. CONST. art. II, § 3 ("free, fair, and open"); COLO. CONST. art. II, § 5 ("free and open"); DEL. CONST. art. I, § 3 ("free and equal"); ILL. CONST. art. II, § 3 ("free and equal"); IND. CONST. art. II, § 1 ("free and equal"); KY. CONST. Bill of Rights, § 6 ("free and equal"); MD. CONST. Declaration of Rights, art. VII ("free and frequent"); MASS. CONST. Declaration of Rights, art. IX ("free"); MISS. CONST.

generally underutilized form of protection for the integrity of elections.<sup>34</sup> The constitutions of sixteen states authorize the people to "instruct" their representatives,<sup>35</sup> another largely underutilized set of provisions that state courts have tended to interpret weakly.<sup>36</sup> Finally, a few state courts have even rejected the application of the political question doctrine to the Guarantee Clause of the United States Constitution, and have held that the federal Constitution imposes on states an affirmative obligation to maintain certain minimal levels of democratic control through electoral devices.<sup>37</sup>

If constitutionally established mechanisms of popular control such as these are at all capable of making a government democratically responsive, then there should be no doubt that state governments are, as proponents of devolution contend, more responsive than the national government. Is this the case? Before turning to an evaluation of governmental responsiveness, it will be useful to consider some of the reasons why the state and federal constitutions seem to take such different approaches to the construction and maintenance of democratic responsiveness.

## II. THE REASONS FOR STATE PURSUIT OF ENHANCED RESPONSIVENESS

In adopting a plethora of devices designed to enhance the democratic responsiveness of state government, state constitutions clearly reject the approach taken by the United States Constitution.

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art. XII, § 247 ("fairness in"); MO. CONST. art. I, § 25 ("free and open"); MONT. CONST. art. II, § 13 ("free and open"); NEB. CONST. art. I, § 22 ("free"); N.H. CONST. art. I, § 11 ("free"); N.M. CONST. art. II, § 8 ("free and open"); N.C. CONST. art. I, §§ 9, 10 ("free and frequent"); OKLA. CONST. art. III, § 5 ("free and equal"); OR. CONST. art. II, § 1 ("free and equal"); S.C. CONST. art. I, § 5 ("free and open"); S.D. CONST. art. VI, § 9 ("free and equal"); TENN. CONST. art. I, § 5 ("free and equal"); UTAH CONST. art. I, § 17 ("free"); VT. CONST. ch. II, § 55 ("free and pure"); VA. CONST. art. I, § 6 ("free"); WASH. CONST. art. I, § 19 ("free and equal"); WYO. CONST. art. I, § 27 ("free and equal").

34. See generally Matthew C. Jones, *Fraud and the Franchise: The Pennsylvania Constitution's "Free and Equal Election" Clause as an Independent Basis for State and Local Election Challenges*, 68 TEMP. L. REV. 1473 (1995).

35. See, e.g., CAL. CONST. art. I, § 3; FLA. CONST. art. I, § 5; IDAHO CONST. art. I, § 10; IND. CONST. art. I, § 31; KAN. CONST. Bill of Rights, § 3; ME. CONST. art. I, § 15; MASS. CONST. Declaration of Rights, art. 19; MICH. CONST. art. I, § 3; NEV. CONST. art. I, § 10; N.H. CONST. art. I, § 32; N.C. CONST. art. I, § 12; OHIO CONST. art. I, § 3; OR. CONST. art. I, § 26; TENN. CONST. art. I, § 23; VT. CONST. Declaration of Rights, art. XX; W. VA. CONST. art. III, § 16.

36. See generally *Fuller v. Haines*, 112 N.E. 873 (Mass. 1916).

37. See generally *Van Sickle v. Shanahan*, 511 P.2d 223 (Kan. 1973); *In re Initiative Petition No. 348*, 820 P.2d 772 (Okla. 1990); *Heimerl v. Ozaukee City*, 40 N.W.2d 564 (Wis. 1949).

Why? Several possibilities come to mind.

First, it may be that state constitutions reflect a belief in a subjective common good—one that is defined by the beliefs of the majority—and a concomitant rejection of the concept of an objective common good as the framers of the United States Constitution understood it. Second, state constitutions might retain an underlying belief in an objective common good, but reflect instead a lack of faith in state officials that far exceeds any reservations the federal framers might have had about federal officials. This lack of faith might take two forms. First, state constitutions might reflect a lack of faith in the *ability* of state officials to perceive the common good, or at least a belief that state officials are less able to perceive the common good than is the general public, thereby necessitating constitutional mechanisms that heighten the democratic responsiveness of state government. Alternatively, state constitutions might reflect a lack of faith, not in the ability of state officials to perceive the common good, but in their *willingness* to pursue it. That is, state officers know what they ought to do, but for some reason fail to do it. In my view, the last of these possibilities comes closest to the truth.

#### A. *The Belief in an Objective Common Good*

There is no particular reason to think that those who drafted and ratified state constitutions were any more inclined than the framers of the federal Constitution to embrace a subjective conception of the common good. First, not only were the earliest state constitutions contemporaneous with the federal Constitution, and thus likely to reflect similar philosophical assumptions, but many of them were actually drafted by some of the same individuals who wrote the federal document.<sup>38</sup> These early constitutions exercised a tremendous influence over the drafting of constitutions for states later admitted to the Union, providing models and, in many cases, actual language.<sup>39</sup> Moreover, several of these early constitutions are still in force, presumably continuing to reflect the assumptions under which they

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38. For example, George Mason was the “chief architect” of the 1776 Virginia Constitution; see A.E. DICK HOWARD, 1 COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 7 (1974); and Benjamin Franklin was a delegate to the 1776 Pennsylvania constitutional convention. See J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776 136 (1936).

39. See generally Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541 (1989).

were drafted.<sup>40</sup>

Second, American state constitutions universally contain many of the same democratically unresponsive institutions contained in the United States Constitution. Every state constitution provides for a bill of rights, judicial review, a gubernatorial veto, and the separation of powers, and all but one provides for a bicameral legislature.<sup>41</sup> State constitutions even contain undemocratic features not found in the federal Constitution such as grants to courts of authority to establish rules of common law.<sup>42</sup> Thus, state constitutions do not reflect an unlimited embrace of the results of pure majoritarianism.

Third and most importantly, every state without exception utilizes electoral mechanisms that “overreward” political success. On any political or electoral issue, the electorate is likely to be divided. Yet in American elections this division is rarely reflected with much accuracy, if at all, once the votes are aggregated for the purpose of determining who is entitled to hold office.<sup>43</sup> This is due primarily to the nature of the electoral systems adopted by the states.<sup>44</sup> For example, under the winner-take-all system, a party whose candidates each receive 51 percent of the relevant popular vote may in theory occupy 100 percent of the available offices. This tendency is even more pronounced in jurisdictions that use a “first-past-the-post” system, in which an office may be awarded to the candidate who receives the largest plurality of votes. The use of single-member districts, in which the polity represented by a multimember body such as a legislature is divided up into small districts each entitled to elect a single representative, also increases the degree to which electoral success is overrewarded in the ultimate results.<sup>45</sup>

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40. For example, the original constitutions of Massachusetts (1780) and Vermont (1784) are still in force.

41. The exception is Nebraska. See NEB. CONST. art. III, § 1.

42. See generally Judith S. Kaye, *Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727 (1992).

43. See, e.g., Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1712–15 (1993) (discussing aggregation phase of voting process); Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 U.C.L.A. L. REV. 227, 266–67 (1985) (stating winner-take-all single-member districting “assures that one group, the winning coalition of subgroups constituting the majority, will gain everything and the other groups nothing”).

44. Although Congress has the power to prescribe election codes for federal elections, U.S. CONST. art. I, § 4, it has for the most part left the regulation of federal elections to the states.

45. See generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 71–118 (1994); Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205; Levinson, *supra* note 43, at 266–67.

These systems are sometimes harshly criticized, with some justice, for submerging minority views.<sup>46</sup> Yet critics often miss their mark by failing to engage the practice of electoral overrepresentation at the level of its own justifications. The American tradition of political thought discussed earlier suggests ready reasons why electoral overrepresentation might be thought to be a natural and desirable feature of an electoral system. These justifications depend on a belief in an objective common good.

Electoral mechanisms that overreward political success share one feature in common: they presuppose the inevitability, or at least the desirability, of a unified polity. A government that lacks a dominant majority may find it difficult to act decisively or consistently, and may find itself prone to reversals or inconsistencies when it is unable regularly to command a majority on contested issues. A polity that selects, from among the available alternatives, an electoral system that overrewards political success surely does so for the purpose of assuring, as much as possible, that the society moves along a single, coherent course.<sup>47</sup> The belief that it is desirable for a society to pursue a single, consistent course in turn reflects the commonplace assumption that the purpose of politics is to discover the common good and to achieve it through concerted social action.<sup>48</sup> Yet by definition there can be only one common good. It follows that whenever, after a political contest, a society has settled upon the content of the common good, there can be little reason to do anything other than pursue it as efficiently and aggressively as possible. That is

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46. GUINIER, *supra* note 45, chs. 3–5; Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 174 (1989); Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 3 (1991).

47. See Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1350 (1987) (arguing that a polity might want to give electoral winners a “victory bonus” to “promote effective governance in a markedly decentralized political systems that always skirts the dangers of excessive fragmentation and destabilizing fluidity”). Rae calls this “defractionalization” and claims that it is designed to produce “an effective flow of public policy.” DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* 136 (1967). Another purpose of overrewarding political success may be to emphasize social unity through symbolic means. Thus, a polity’s designation of a single executive rather than an executive council reifies the unity of the people at whose head the executive sits. Election of a single legislator from a single district likewise treats the people of the district as united behind their choice.

48. This is a belief that goes back in Western thought at least as far as the ancient Greeks. See, e.g., ARISTOTLE, *THE POLITICS OF ARISTOTLE* 1278b, 1283b (Ernest Barker ed. & trans., Oxford 1946). As Locke later put it, “the power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good. . . .” JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* at 73 (Thomas P. Peardon, ed. 1952).

precisely what political overrepresentation is intended to facilitate.

Critics of electoral overrepresentation often argue that it amounts to an unwarranted usurpation of power by a bare majority.<sup>49</sup> While this view has certain obvious merits, it is based on pluralist assumptions very different from the ones I have been describing. What, after all, is a political contest? To say that electoral overrepresentation usurps power is implicitly to understand politics as a struggle for control over the levers of power. Overrepresentation may thus amount to usurpation because it involves ignoring or suppressing the views and interests of a political minority. This suppression is sometimes said to be doubly bad: not only does it marginalize members of political minorities by denying them a voice in the shaping of public policy, but it also creates a false appearance of social unity by papering over the reality of a society riven by contests over political truth.<sup>50</sup>

But the assumptions underlying American constitutional regimes of electoral overrepresentation are altogether different. Under American constitutions, political contests do not rest on the idea that political truths are contestable, and that the purpose of elections is therefore to marshal power so as to propel one particular subjective truth temporarily to primacy. Rather, political contests in the American tradition rest more on a kind of Jeffersonian epistemology holding simply that the majority is more likely than the minority to have correctly perceived the objectively defined common good.<sup>51</sup> A

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49. This is the central argument of GUINIER, *supra* note 45; see also DOUGLAS J. AMY, *REAL CHOICE/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES* ch. 1 (1993) (arguing that the single-member plurality system denies representation altogether to those who vote for the losers); Andrea Bierstein, *Millenium Approaches: The Future of the Voting Rights Act After Shaw, DeGrandy, and Holder*, 46 HASTINGS L.J. 1457, 1482-83 (1995) (making similar argument).

50. GUINIER, *supra* note 45, ch. 5; see also Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1654 (1983) (explaining that the Voting Rights Act's provisions to guarantee safe districts to racial minorities "simulates a discrimination-free result but at a considerable cost to the fairness and integrity of the political process").

51. See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 40 (Harvard 1989); ADRIENNE KOCH, *THE PHILOSOPHY OF THOMAS JEFFERSON* 20, 118, 149-50, 153 (Quadrangle 1943); DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 103-04 (U. Virginia 1994); MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* 136-41 (Oxford 1978). A belief in the wisdom of majority rule need not, of course, rest on epistemological grounds. Like the Framers, the Progressives, for example, believed that institutions could be pragmatically structured to achieve good rule through majoritarian institutions. Thus, the contemporary preference for single-member districts derives in part from

democratic election thus represents nothing more than an opportunity for society's members to put their heads together and attempt to identify the common good. In a society that professes a Jeffersonian faith in the collective wisdom of the common people, there is nothing for any reasonable person to do following an election except yield graciously to the superior wisdom of the majority—in Jefferson's words, to "bow down to the general reason of the society."<sup>52</sup>

The adoption in a jurisdiction of truly responsive electoral institutions such as proportional representation would tell a different tale. Proportional representation and allied systems tend to impugn the notion of an objective common good by treating the polity as disaggregated and plural, and then institutionalizing this plurality in a lasting way—for example, by establishing a form of parliamentary rule that depends upon coalition-building. This kind of institutional recognition of political disaggregation lends credence to the possibility of deeply contested political truths, and thus to the likelihood of a common good that is merely subjective. The fact that no state has ever adopted such a system or even, so far as I am aware, given it serious consideration,<sup>53</sup> is further evidence that state constitutions, like the federal Constitution, rest on a conception of an objective common good.

### *B. Lack of Faith in State Officials*

If state constitutions do not provide for greater democratic responsiveness because they reflect an underlying belief in a subjective common good, then we need to explore the possibility that they do so because they reflect instead an underlying lack of faith in state officials. To begin with, I see no evidence that state officials are, or are thought to be, less capable than federal officials of perceiving the common good. It is especially hard to see why this might be the case given that the vast majority of federal office holders start their

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Progressivism's "median preference theory of representation." According to this theory, representatives elected from large, heterogeneous single-member districts will be forced to respond to the median political position of the district's voters, thereby minimizing the possibility that representatives will be elected who will respond to and pursue politically extreme or narrow-interest positions—that is, those that are unwise or contrary to the common good. See BRUCE CAIN, *THE REAPPORTIONMENT PUZZLE* 65 (1984).

52. MAYER, *supra* note 51, at 103.

53. According to one recent study, experience with proportional representation in the United States is limited to the municipal level. See AMY, *supra* note 49, at 10–11. Interestingly, the 1924 Model Constitution, drafted by a convention of Progressive reformers, proposed a unicameral legislature and proportional representation. See generally NATIONAL MUNICIPAL LEAGUE, *A MODEL STATE CONSTITUTION* (1924).



political careers on the state and local levels.<sup>54</sup> If anything, the popular assumption today seems to be that moving from state capitals to Washington makes officials dumber rather than the other way around. If state constitutions, then, reflect a lack of faith in state officials, it appears to be a lack of faith not in their ability to perceive the common good, but in their willingness to pursue it.

This view finds significant support in the historic evolution of state constitutions. In the early days of the republic, state constitutions generally resembled the United States Constitution: they tended to be short, to limit their subject matter to what Marshall called the "great outlines"<sup>55</sup> of government power, and to delegate substantial amounts of unrestricted power to the political branches.<sup>56</sup> With the exception of the oldest state constitutions still in force, state constitutions today tend to look distinctly different from the federal model. They are lengthy, go into considerable detail in many areas of law, and contain numerous restrictions concerning the mechanics of governmental administration.<sup>57</sup>

A striking number of the most typical state constitutional innovations represent deliberate public responses to specific acts of governmental malfeasance. For example, many state constitutions sharply restrict the state's ability to incur debt. These restrictions date mostly from the middle third of the nineteenth century, and were adopted in response to a series of disastrous public works expenditures on canals and railroads that caused serious financial difficulty for numerous states.<sup>58</sup> Many state constitutions require that the title of a bill accurately reflect its subject. These provisions grew out of the infamous Yazoo scandal of 1795, in which the Georgia state legislature enacted a law whose innocuous title did not accurately reflect the fact that the law's main purpose was to sell public lands to private speculators at an unconscionably low price.<sup>59</sup>

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54. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 178 (1980).

55. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

56. *See, e.g.*, MASS. CONST. (1780); N.Y. CONST. (1776); S.C. CONST. (1776); VA. CONST. (1776).

57. *See generally* Albert L. Sturm, *The Development of State Constitutions*, 12 *PUBLIUS* 57 (1982).

58. *See* Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 *WIS. L. REV.* 1301, 1306-10 (1991).

59. *See* Millard H. Ruud, "No Law Shall Embrace More Than One Subject," 42 *MINN. L. REV.* 389, 391-92 (1958). Interestingly, although such constitutional provisions seem designed to prevent legislators from being misled during hasty sessions, a more accurate title would not likely have changed the outcome of the Yazoo scandal itself:

This linkage between governmental malfeasance and constitutional reform was especially pronounced during the Progressive Era. Influenced by the earlier agrarian Populist movement with which it merged,<sup>60</sup> Progressivism responded to broad-based and deeply felt beliefs that much of substance was wrong with the country; that a main source of its problems was an unjust status quo that benefited the wealthy and entrenched at the expense of the common citizen; that government had the ability and responsibility to intervene and improve the lot of the disadvantaged majority; and that government had thus far refused to take the necessary actions because it had become dominated by, and had come to serve, the very entrenched and privileged interests responsible for the nation's ills.<sup>61</sup> In the words of Benjamin Parke De Witt, an early historian of the Progressive movement, its purpose was to oppose "the control of government by special interests and the prostitution of government to serve the needs of a small minority."<sup>62</sup> Progressives fought this domination by waging largely successful campaigns for reforms such as expanded suffrage, secret ballots, direct primaries, initiatives, referenda, recall, campaign finance disclosure, and easier constitutional amendment, among others, many of which were eventually implemented at the constitutional level.<sup>63</sup> The purpose of these reforms was, according to the Progressives themselves, "to dissolve the unholy alliance between corrupt business and corrupt politics"<sup>64</sup> by giving "a majority of the people . . . an easy, direct, and certain control over their government."<sup>65</sup>

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according to one historian, "only one of the legislators voting for [the bill to sell public lands] had not been bribed in some way by the land companies." C. PETER MAGRATH, *YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF FLETCHER V. PECK* 7 (Brown University Press 1966).

60. RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 133 (Vintage 1955).

61. See generally *id.* at 131–212; BENJAMIN PARKE DE WITT, *THE PROGRESSIVE MOVEMENT* (U. of Wash. Press 1968) (1915); ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877–1920*, chs. 2–7 (Hill & Wang 1967).

62. DE WITT, *supra* note 61, at 46.

63. See, e.g., DE WITT, *supra* note 61, chs. 10–11; *The Progressive Party Platform of 1912*, reprinted in RICHARD HOFSTADTER, *THE PROGRESSIVE MOVEMENT 1900–1915*, at 129 (1963); William Allen White, *The Old Order Changeth*, reprinted in RICHARD HOFSTADTER, *THE PROGRESSIVE MOVEMENT, 1900–1915*, at 133–36 (1963);

64. *Progressive Party Platform of 1912*, *supra* note 63, at 128.

65. DE WITT, *supra* note 61, at 196.

### III. IS DEMOCRATIC RESPONSIVENESS POSSIBLE?

It thus appears that state constitutions evince an underlying belief that state officials are not sufficiently willing to pursue what they, along with society generally, know to be the common good. Assuming this proposition to be true, why should it be so? This question raises some vexing issues concerning the nature and sources of governmental responsiveness to the popular will.

#### A. *Factions in State Government*

Madison surely would not have been surprised to find that state governments are less willing than the federal government to pursue the common good. According to Madison this is precisely what we ought to expect in light of the heightened responsiveness of the states. Their small size and greater proximity to the people, Madison believed, make state governments highly responsive.<sup>66</sup> Yet these very features also vastly increase the likelihood that the responsiveness of state governments will amount in practice to responsiveness to factions, which by definition do not seek the common good.<sup>67</sup> If this is correct, then state constitutions, for all the many ways in which they differ from the federal Constitution, are actually in substantial philosophical agreement with it. On the federal level, the nation's great size and the separation of powers are sufficient checks against the evils of majority faction. The much smaller states, on the other hand, are far more susceptible to this problem:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.<sup>68</sup>

State constitutions, on this view, provide greater opportunities for democratic control than does the federal Constitution principally to guard against the possibility that the reins of government will be seized by factions.<sup>69</sup>

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66. See THE FEDERALIST NO. 10, at 83-84 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 46, at 295-97 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 10, at 119-20 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

67. See THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

68. *Id.* at 83.

69. Interestingly, the Progressives believed that the Madisonian emphasis on size and

This view of the matter, however, presents an interesting chicken-and-egg problem: are state governments more responsive to faction because they offer more opportunities for democratic control, or do they offer those opportunities because they are more responsive? Is democratic control, then, the problem or the cure? One might be tempted to say that because most state constitutional mechanisms enhancing popular control are of comparatively recent vintage they should be understood as cures, yet the truth is more complex. First, the Framers thought state governments to be more responsive than the proposed federal government, and thus more susceptible to faction, well before any of the modern institutions of democratic control were in place. To be sure, this belief was based partly on the more democratic nature of post-Revolutionary state governments—their provisions for direct election of officials and rotation in office, for example—but it was based as well on an understanding of the implications of physical proximity. By being more immediately at hand than federal officials, state officials were thought to be both more knowledgeable about local conditions and policy preferences, and more available to constituents seeking government action.<sup>70</sup>

Second, it is easy to see how constitutional mechanisms of popular control might not only fail to cure the problem of excessive state responsiveness, but worsen it. If state governments are more susceptible to faction, democratic controls are hardly the answer since the general public is likely to be, if anything, even more susceptible to factional passions than a republican institution of government such as a legislature. This belief is a foundational assumption not only of the American constitutional preference for republican government over pure democracy, but also of that quintessentially countermajoritarian mechanism, the Bill of Rights.

If constitutional mechanisms of direct democracy increase governmental responsiveness to factions, one might say in response that such mechanisms at least increase the likelihood that state governments will respond to factions consisting of a democratic majority instead of narrower special interests, but this will hardly do. In the first place, both kinds of factions by definition pursue their own self-interest at the expense of the common good, and majority factions are said to be worse because they can actually carry out their plans.<sup>71</sup>

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separation of powers was misplaced: in their view, the national government had been captured by very narrow but extremely powerful special interests. *See, e.g.,* DE WITT, *supra* note 61, ch. 8.

70. *See generally* THE FEDERALIST NO. 10, *supra* note 66, at 81.

71. THE FEDERALIST NO. 10, *supra* note 66, at 80.

In the second place, even assuming, contrary to Madison, that majority faction is preferable to minority faction, there is no good reason to suppose that state governance decisions made through mechanisms providing for substantial, direct popular involvement will be any more likely than are republican mechanisms of indirect democracy to reflect the will of a broad-based majority—even one that could be deemed a faction.

*B. The Inevitability of Governmental Responsiveness to Factions*

Political scientists who study the electorate have provided considerable evidence to support the conclusion that states are more responsive than the federal government to narrow, minority factions. For decades, studies have shown that the American electorate is by and large apathetic and uninformed.<sup>72</sup> These characteristics manifest themselves not only in generally low levels of voter turnout in national elections,<sup>73</sup> but also in the American electorate's lack of political sophistication. In the words of one commentator, "[t]he typical American voter . . . knows little about politics, is not interested in politics, does not participate in politics, does not organize his or her political attitudes in a coherent manner, and does not think in structured, ideological terms."<sup>74</sup>

Other studies, however, show that the electorate's general tendencies become more pronounced the more local the election. As low as turnout may be in elections to federal office, it is even lower for state elections, and lower still for local elections.<sup>75</sup> If Americans are apathetic in general, they care even less about state politics than national politics, and are less well informed about issues confronting the state.<sup>76</sup> According to one study, for example, fewer than one-third

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72. The classic study in the field is ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960).

73. See generally WARREN E. MILLER & J. MERRILL SHANKS, *THE NEW AMERICAN VOTER* 39–69 (1996); RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* (1992).

74. ERIC R.A.N. SMITH, *THE UNCHANGING AMERICAN VOTER* 1–2 (1989).

75. See, e.g., LESTER W. MILBRATH, *POLITICAL PARTICIPATION: HOW AND WHY DO PEOPLE GET INVOLVED IN POLITICS?* 104 (1965); TEIXEIRA, *supra* note 73, at 6; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 397 (1990).

76. See, e.g., DAVID R. BERMAN, *STATE AND LOCAL POLITICS* 14 (4th ed. 1984); MORRIS J. LEVITT & ELEANOR G. FELDBAUM, *OF, BY AND FOR THE PEOPLE: STATE AND LOCAL GOVERNMENT AND POLITICS* 88 (1980). Regarding the local level, see, e.g., HARVEY J. TUCKER & L. HARMON ZEIGLER, *PROFESSIONALS VERSUS THE PUBLIC: ATTITUDES, COMMUNICATION, AND RESPONSE IN SCHOOL DISTRICTS* 230 (1980).

of the public knows "what is happening in their state governments."<sup>77</sup> In another study that asked voters to rank their attentiveness to international, national, state and local affairs, only 17% said they were most attentive to state affairs.<sup>78</sup>

Clearly, the less citizens know and care about some political arena, and the less they participate in political decision making in that arena, the easier it will be for highly motivated or well-financed narrow special interest groups to exercise a disproportionate impact on the relevant political outcomes. This danger to broad-based democratic responsiveness at the state level is only exacerbated by the fact that state governments generally offer more opportunities for political corruption than does the federal government. First, political power is typically more dispersed on the state level. Unlike the federal executive branch, which is entirely centralized and under the direction of a single official, state executive branches are typically pluralistic, containing multiple power centers clustered around independently elected officials with distinct spheres of influence. Each of these power centers represents a separate arena in which an interest group may compete for influence. Second, state power is far greater in extent than federal power, at least in theory.<sup>79</sup> Unlike federal power, which is limited and enumerated, state power is general and extends to every conceivable subject of governance.<sup>80</sup> It follows, in theory at least, that the activities of state government will be of interest to a greater number of groups, thus making it a more active arena for interest group contests. Finally, press oversight, which has proved an invaluable check against government corruption on the federal level, is virtually absent at the state level.<sup>81</sup>

These observations are borne out by studies of initiatives in states that permit them. Intended originally as a way for the people to

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77. LEVITT & FELDBAUM, *supra* note 76, at 88.

78. M. Kent Jennings & Harmon Zeigler, *The Salience of American State Politics*, 64 AM. POL. SCI. REV. 523, 525 (1970).

79. I say "in theory" because it sometimes seems as though the scope of congressional power has expanded almost to the limits of state power. Perhaps the Court's recent decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *Printz v. United States*, 521 U.S. 98 (1997), foreshadow a move to reassert the traditional relationship.

80. The classic statement of this proposition is Walter F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201, 205 (1915). Court decisions to this effect are far too numerous to list. For one recent example, see *Client Follow-Up Co. v. Hynes*, 390 N.E.2d 847, 849 (Ill. 1979) (explaining that because "the basic sovereign power of the State resides in the legislature . . . there is no need to grant power to the legislature").

81. See generally Charles Layton & Mary Walton, *Missing the Story at the Statehouse*, 20 AM. JOURNALISM REVIEW 42 (1998); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 843-44 (1996).

bypass state legislatures perceived as beholden to powerful special interests by acting directly to achieve the common good, initiatives and referenda have fallen well short of their proponents' ambitious goals. Ballot propositions are often lengthy and complex, and use technical or legal jargon unfamiliar to voters.<sup>82</sup> According to one study, comprehension of ballot propositions typically requires a college or graduate education, an educational level attained by less than twenty percent of the populace.<sup>83</sup> The result is that voters are frequently confused about the meaning of the ballot measures on which they are asked to vote,<sup>84</sup> sometimes to the point of voting against the very positions they wish to take.<sup>85</sup>

Widespread voter confusion not only undermines the ability of initiatives and referenda to respond to the popular will by obscuring it, but also makes these instrumentalities of direct democracy particularly susceptible to exploitation by well-financed special interests.<sup>86</sup> Today, the typical initiative campaign pits "a poorly funded grass roots coalition" against "a corporate-backed organization with significant financial resources."<sup>87</sup> In Oregon, for example, the energy, tobacco and trucking industries have funnelled millions into blocking proposed limitations on nuclear power, smoking in public places and unsafe trucking practices.<sup>88</sup> Furthermore, the complexity of ballot issues and the efforts voters must undertake to inform themselves skew voter turnout on ballot propositions in favor of better educated, more affluent and older voters,<sup>89</sup> a group far from

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82. See Jane S. Schachter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 127-29, 136-37 (1995).

83. See DAVID MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 118-19 (1984).

84. See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 208-09 (1989); Catherine A. Rogers & David L. Faigman, "And to the Republic for Which It Stands": *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L. Q. 1057, 1064-66 (1996).

85. See Schachter, *supra* note 82, at 140 n.140 (citing PHILIP L. DUBOIS & FLOYD F. FEENEY, *IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE* 125-33 (1992)).

86. See BETTY H. ZISK, *MONEY, MEDIA AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS* 139-60 (1987).

87. Robyn Polashuk, *Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections*, 41 U.C.L.A. L. REV. 391, 404-05 (1993).

88. See Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; The Use and Abuse of Initiative and Referendum, A Local Government Perspective*, 19 SEATTLE U. L. REV. 47, 85 (1995).

89. See David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 33-34 (1995).

representative of the general population.<sup>90</sup> In light of these developments, it seems impossible to claim that mechanisms of direct democracy provide a vehicle by which popular majorities may circumvent state legislatures dominated by narrow factions. If anything, direct democratic control seems only to supply another route by which narrow factions may use governmental institutions to advance their own self-interest at the expense of the common good.

### C. *The Paradox of Democratic Unresponsiveness*

I have argued thus far that the greater tendency of state constitutions to provide mechanisms for the exercise of tighter democratic control over government reflects an underlying belief that state officials cannot be as thoroughly trusted as federal officials to pursue the common good. I have suggested that this approach is fully consistent with Madisonian assumptions about republican government on the state and federal levels, but also that the kinds of apparently more democratic mechanisms to which states have resorted are unlikely to alleviate the problem. This difficulty forces us to confront a much more damaging and potentially far-reaching critique that some political scientists have made of the concept of democratic responsiveness itself.

Political scientists have long argued that democratic governments are not responsive to "the popular will" as such. Rather, they are responsive only to "activists"—that is, to members of the political community who communicate their preferences to government officials.<sup>91</sup> Citizens can communicate their preferences in a wide variety of ways. In a recent major study, Sidney Verba and his colleagues include in their definition of activism anything from low-involvement activities like voting, to affiliation with a political organization, contacting government officials, attending meetings of political organizations, and making campaign contributions, all the

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90. See *infra* notes 93–94 and accompanying text.

91. See generally SIDNEY VERBA, ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICA* (Harvard 1995); L. HARMON ZEIGLER & HARVEY J. TUCKER, *THE QUEST FOR RESPONSIVE GOVERNMENT: AN INTRODUCTION TO STATE AND LOCAL POLITICS* (Duxbury Press 1978). I set aside here a potentially even more potent critique of the notion of responsiveness to the popular will based on Arrow's Impossibility Theorem and public choice theory. For an overview, see generally Richard H. Pildes & Elizabeth Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990). For a concise and insightful comparison of the pluralism and public choice critiques of democracy, see JERRY L. MASHAW, *GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 1–29 (1997).



way up to intensely involving activities like paid political lobbying.<sup>92</sup> Whatever the method, though, the underlying point is the same: governments respond to activism because it is the only thing they *can* respond to—it is the only stimulus they receive.

This relationship would hardly be worth mentioning were it not for the fact that activists are rarely representative of the general public, nor are their views and positions often typical. In fact, activists tend to be, in the terminology of political science, “elites”—people who are better educated and better off both socially and financially than the general public.<sup>93</sup> The differences between activists and the general public mean that the messages typically communicated to government decision makers tend to differ from the messages that would be communicated by a more representative group of intermediaries, and these messages tend to be communicated in a more systematic way. As Verba puts it, “[t]hose whose preferences and needs become visible to policy makers through their activity are unrepresentative of those who are more quiescent in ways that are of great political significance: although similar in their attitudes, they differ in their personal circumstances and dependence upon government benefits, in their priorities for government action, and in what they say when they get involved.”<sup>94</sup>

The unrepresentativeness of political activists presents a disturbing paradox. If to be responsive is necessarily to respond to the wishes of a small, elite, unrepresentative segment of the populace, then the only way for a government to be genuinely responsive to the wishes of its constituents is to refrain from responding to their expressions of those wishes—to be, in a word, *unresponsive*. Indeed, a government committed to such a course would be for all intents and purposes completely unresponsive since it would by hypothesis refuse to respond to the only kinds of stimuli that citizens are capable of producing. Yet such an approach would hardly differ in principle from a Burkean government whose members deliberated abstractly on the common good and ruled out consideration of any communications from constituents on the ground that such communications are by definition a kind of unrepresentative special pleading.<sup>95</sup> Thus, the more responsive a government tries to be, the less responsive it is

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92. See VERBA, *supra* note 91, chs. 2–3.

93. See *id.* at chs. 4–7.

94. *Id.* at 227.

95. See, e.g., HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 168–89 (U. Cal. 1967).

capable of being, and vice versa.<sup>96</sup>

These findings, if correct, are highly troubling for they entirely collapse the difference between responsive and unresponsive government. Or, put another way, they suggest that the search for democratically responsive government is a fool's errand because no form of government, even the most democratic, is responsive; all are unresponsive, each in its own way. And this is a notion that calls into question the workability, indeed the very possibility, of democracy itself.

#### IV. SOME POSSIBLE RESOLUTIONS

Must we then abandon our aspirations for democratically responsive government? I want to touch briefly on three possible responses to the paradox of democratic unresponsiveness set out above.

The easiest, and perhaps the least satisfying response to this problem is to dissolve it by redefining democracy in pluralist terms. This is the solution that most political scientists seem to prefer. Harmon Zeigler, to cite one prominent example, suggests the following way of reformulating the question of whether state governments are more responsive than the federal government. In his seminal study of interest group politics, Zeigler argues that federalism should not be understood as a struggle between nation and state but as a struggle "among interests who have favorable access to one of the two levels of government."<sup>97</sup> According to this view, the key feature of federalism is not that state governments are more responsive to the popular will than the federal government, but that different kinds of factions, organized differently or commanding different kinds of resources, are better equipped to exert influence in one forum than another. Thus, shifting power to the state level is unlikely to enhance the responsiveness of government to the popular will, but is very likely to alter the mix of special interests capable of evoking favorable governmental action.

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96. Jim Rossi has described a similar paradox involving a tradeoff between participation and deliberation in the area of administrative governance. Devices that are designed to increase public participation in governmental decision making, and thereby to enhance governmental responsiveness, may actually thwart responsiveness by reducing the quality of decisions or by so increasing the burden involved in making decisions as to drive agencies away from modes of action in which public participation is required. See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 211-41 (1997).

97. HARMON ZEIGLER, *INTEREST GROUPS IN AMERICAN SOCIETY* 48 (1964).

By analogy, the same may be said of the state constitutional predilection toward mechanisms of popular democratic control. On this view, contrary to the beliefs of the Progressives, democratically oriented reform measures like initiatives, referenda, term limits and independently elected executive branch officials are no more likely than the federal model of republican government to produce decisions genuinely responsive to the popular will. They are, however, likely to make the government responsive to a different set of unrepresentative special interests—namely, those that for reasons of organization or resources are better suited to get their way in an initiative fight, say, than in a legislative one.

While this approach restores the possibility of democracy, it does so at considerable cost, for it requires abandoning any aspirations for government that is truly responsive to the majority will, public-regarding, and, in consequence, substantively good. In its place, pluralism offers a Schumpeterian clash of self-interested factions, a morally shallow kind of governance of doubtful legitimacy in a society like ours. Certainly to embrace such a political system requires abandoning the vision of the nation's founders who, although they conceded the possibility of self-interested behavior and took pains to guard against its effects, hoped nonetheless that virtuous self-government for the common good would be the norm.<sup>98</sup> This kind of pluralism, moreover, is even further from the vision of the Progressives, who believed fervently in the virtue and public spirit of the ordinary citizen.<sup>99</sup>

A more measured kind of response to the problem of democratic unresponsiveness might be to accept it as an unfortunate social fact and attempt to deal with it by limiting its worst effects. This approach would recognize citizen apathy and the dominance of narrow special interests as inescapable facts of life in a large modern democracy and, much as the Framers did two centuries ago, attempt to structure institutions of governance so as to impede the ability of such factions to use governmental power for their own narrow purposes. Unlike the Progressives, however, this approach suggests a solution not in institutions of democratic control, which seem only to exacerbate the problems of factional dominance, but in institutions that make government even *less* responsive than it is now. Thus, we might turn to a governance structure like Calhoun's system of concurrent

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98. See THE FEDERALIST NO. 10, *supra* note 18, at 82–84.

99. Hofstadter calls the idealized Progressive citizen the "Man of Good Will." HOFSTADTER, *supra* note 60, at 260–61.

majorities, in which the power to veto proposed governmental action is far more widely distributed than it is today.<sup>100</sup> Some of the recent theoretical work on deliberative democracy strikes me as moving in that direction.<sup>101</sup>

One of the great problems with such an approach, however, is that it impedes the ability of government to take any action at all, not merely those actions which are sought by and for the sake of a selfish minority faction. Such a system would tend to entrench the status quo, which might only create further problems if the status quo is in some way unjust.<sup>102</sup> If the history of American governance has really been the kind of history of special interest dominance suggested by political scientists, then the status quo is virtually guaranteed to be biased against the common good and in favor of the most recently dominant selfish factions. Thus, merely disabling government from changing the present status quo without simultaneously reconsidering its substance would likely only constitutionalize and entrench the very gains that under this approach are deemed by hypothesis to be illegitimate.<sup>103</sup>

A third possible response to the problem of democratic unresponsiveness would be to reaffirm contemporary aspirations for democratically responsive self-government, acknowledge the failure of present institutions to achieve it, and simply go back to the constitutional drawing board for another try. Before doing so, however, it might be worth reflecting on a key assumption underlying this strategy: the assumption that institutional design, implemented through perspicacious constitutional drafting, can have a significant impact on the outcomes of a society's politics. Perhaps if the Framers of the United States Constitution erred, it was neither in their political philosophy nor in their analysis of the politics of their day, but in their belief that constitutional craftsmanship alone could counteract a society's political shortcomings.

A few judges have occasionally expressed such sentiments. Justice Jackson, for example, once observed that the formal

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100. See JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT* (C. Gordon Post ed., 1953).

101. See James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421, 443-46 (1996).

102. See generally CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

103. Of course this might be nothing new. As Bob Williams has observed, constitutionalization has often been used in state politics to preserve what might otherwise be transient political gains on the legislative level. See Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 175 (1983).

separation of constitutional powers could not "keep power in the hands of Congress if it is not wise and timely in meeting its problems . . . [;] only Congress itself can prevent power from slipping through its fingers."<sup>104</sup> Judge Hand expressed a similar sentiment in his well-known comment that "[a] society so riven that the spirit of moderation is gone, no court can save; [and] a society where that spirit flourishes, no court need save . . . ."<sup>105</sup> Political scientists have often said much the same thing. For example, in characteristically blunt terms, E.E. Schattschneider has argued that political parties are capable of subverting the best-considered legal norms:

The political parties are able to compel public officers to behave in ways that the law does not contemplate, by methods of which the law is ignorant, without in any way affecting the validity of their official acts. What goes on behind the formal act, the official seals, and public documents the law refuses to know. Since the parties operate in a legal no man's land they are able to produce startling effects: in effect, they may empty an office of its contents, transfer the authority of one magistrate to another magistrate, or to persons unknown to the constitution and laws of the land. It follows that though politicians may know something about the law, it is completely unnecessary for a lawyer to know anything about politics. . . .<sup>106</sup>

If Schattschneider is right, questions of legal and constitutional design may simply be of little relevance to the problems to which they are addressed. The means by which politics are conducted and the outcomes of political processes may well be beyond the ability of the law, no matter how well-intentioned, to affect in any significant way. And if this is the case, then the only approach capable of succeeding may well be the kind of civic renewal through education and individual participation urged by some contemporary civic republican theorists.<sup>107</sup> The focus, that is, must be on the individual rather than the institution.

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104. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

105. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 155, 164 (I. Dillard ed., 1960).

106. E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 12 (1942).

107. See generally BENJAMIN BARBER, *AN ARISTOCRACY OF EVERYONE: THE POLITICS OF EDUCATION AND THE FUTURE OF AMERICA* (1992); BENJAMIN R. BARBER, *STRONG DEMOCRACY* (1984); AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987).

## V. CONCLUSION

All American constitutions seek to thwart the ability of narrow factions to seize governmental power for the purpose of pursuing their own self-interest at the expense of the common good, yet they do so in different ways. The federal Constitution attempts to prevent factional dominance by impairing popular control over government, the state constitutions by enhancing popular control through mechanisms like initiatives, referenda, rotation in office, recall, and the like. Yet both approaches share two key assumptions: that there is an objectively knowable common good, and that officials are less likely to pursue the common good in a comparatively small, state polity than they are in a comparatively large, national one.

Yet the turn, on the state level, to enhanced popular control has not eliminated factional dominance of state politics, and may well have enhanced it. Worse still, as political scientists have shown, the search for institutional solutions on the constitutional level to the problem of democratic unresponsiveness may well be futile. According to the paradox of democratic unresponsiveness, democratic governments may be incapable of responding to anything other than the narrow interests of self-selected political activists whose views and interests are unrepresentative of those of a genuinely broad-based majority of the polity.

Moreover, none of the ways out of this conundrum seems especially attractive: each requires abandoning to some degree either our aspirations for substantively just self-rule for the good of all or our faith in the technocratic belief that conscientious constitutional design is an effective tool for the control of social and political problems. Ultimately, the solution to the problem of factional tyranny and governmental malfeasance may lie only in the development of cultural values that must be inculcated on and carried forth at the individual level, not institutionally, but one citizen at a time.

